Supreme Court, U.S.
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No. 99-1683

IN THE

Supreme Court of the United States

YANKTON SIOUX TRIBE, and its individual members, United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe,
Petitioners,

v.

MATT GAFFEY, State's Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CITIES DANTE, GEDDES, LAKE ANDES, PICKSTOWN, PLATTE, RAVINIA AND WAGNER, *AMICI CURIAE*, IN SUPPORT OF BRIEF IN OPPOSITION OF STATE AND LOCAL GOVERNMENT PARTIES

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	2
ARGUMENT	3
I. THE DECISION OF THE UNITED STATES NOT TO FILE A PETITION IN THIS CASE IS SIGNIFICANT.	3
II. THE PRIMARY ARGUMENTS SUBMITTED BY THE YANKTON SIOUX TRIBE AND THE UNITED STATES ARE INHERENTLY INCONSISTENT	6
A. THE YANKTON SIOUX TRIBE SUBMITS THAT CONGRESS INTENDED TO LEAVE THE 1858 YANKTON RESERVATION BOUNDARIES INTACT AND, AT THE SAME TIME, CREATE AN AGENCY RESERVATION WITHIN THOSE BOUNDARIES	8
B. THE UNITED STATES ALSO SUBMITS THAT CONGRESS INTENDED TO LEAVE THE 1858 YANKTON RESERVATION BOUNDARIES INTACT AND, AT THE SAME TIME, CREATE AN AGENCY RESERVATION WITHIN THOSE BOUNDARIES	10
CONCLUSION	13

TABLE OF AUTHORITIES

CASES: Page

Bruguier v. Class, 599 N.W.2d 364 (S.D. 1999)... 9, 12
South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) ..... *passim*
United States v. Scott, No. CR98-01-N-EJL (D.Idaho June 25, 1998)..... 3
United States v. Webb, No. CR98-080-N-EJL (D. Idaho Jan. 12, 1999) (Memorandum Decision and Order 3
United States v. Webb, argued No. CR99-30155 (9th Cir. March 9, 2000..... 3
Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999)..... 4-6, 11

OTHER AUTHORITIES:

Supreme Court Rule 10(5)..... 9
Supreme Court Rule 37(4)..... 2
Summary *Judgement* Brief for the United States *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 135 (D.S.D. 1998) (No. 98-4042)..... 11
Motion for Stay Pending Petition for Writ of Certiorari, *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894 3896, 3900) 9, 12
Appellee Yankton Sioux Tribe's Reply Brief at 24, Yankton Sioux *Tribe v. Gaffey*, Nos. 98-3893 8-9
Brief of Cities in Support of Petitioners, *South Dakota v. Yankton Sioux Tribe*, No. 99-1490 (March 7, 2000) 2, 11, 12
Petition for Writ of Certiorari, *South Dakota v. Yankton Sioux Tribe*, No. 99-1490, (Mar. 7 2000) 7, 12
Petition for Writ of Certiorari, *Yankton Sioux-Tribe v.* Gaffey, No. 99-1683, (April 17, (2000)..... 7, 8
Brief for Yankton Sioux Tribe in Opposition, *South Dakota v.* Yankton *Sioux Tribe*, No. 99-1490 (May 8, 2000).....7, 8, 10

TABLE OF AUTHORITIES—Continued

Page

Brief for the United States in Opposition, *State of South Dakota v. Yankton Sioux Tribe* and *Yankton Sioux tribe v. Gaffey*, Nos. 99-1490 and 99-1683 (May 8, 2000) 7, 10-11, 12

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37(4), the Cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, as *amici curiae*, filed a brief in No. 99-1490, in support of Petitioners State of South Dakota, Charles Mix County, and Southern Missouri Waste Management District. Pet. for Writ of Cert., *South Dakota v. Yankton Sioux Tribe*, No. 99-1490, (Mar. 7, 2000). The interest of these Cities is more fully set forth in that brief. In this action, No. 99-1683, the Cities file this brief pursuant to Supreme Court Rule 37(4) as *amici curiae* in Support of the Brief filed by the State and Local Government Parties in Opposition to the Petition filed by the Yankton Sioux Tribe.

In both instances, the Cities primarily track the arguments of the United States. The relentless advocacy of the United States figures prominently in the conflict and confusion in this case and in related cases.

Throughout the remand in this case, the United States argued that the 1858 reservation boundaries should be recognized. The United States now agrees that the Petition of the Yankton Sioux Tribe seeking to reestablish those boundaries should be denied. The United States should have restricted the scope of its Brief in Opposition to that issue.

Instead, the United States also opposes the Petition of the State and Local Government Parties. If this Court accepts the position of the United States and also denies the Petition of the State and Local Government Parties, the Cities will certainly face several more years of unnecessary litigation.

Importantly, other units of local government across the United States can also look forward to similar treatment as the United States seeks to build upon the newly fashioned court-created "agency reservation" adopted by the court of appeals. The potential extension of that reservation concept through the unprecedented Indian country/Indian reservation issue that the court of appeals inserted in this remand *sua sponte* also prom-

ises more divisive jurisdictional uncertainty in South Dakota and in other States.[1]

ARGUMENT

I. THE DECISION OF THE UNITED STATES NOT TO FILE A PETITION IN THIS CASE IS SIGNIFICANT.

We think we understand why the United States decided not to file a Petition for Writ of Certiorari in this case. A Petition by the United States would have necessarily underscored the fact that, on remand, the United States advanced an argument contrary to the express holding of this Court in *Yankton I* with reference to the disestablished 1858 Yankton boundaries.

In *Yankton I*, this Court clearly resolved the issue of the 1858 boundaries:

> This case presents the question *whether*, in an 1894 statute that ratified an agreement for the sale of surplus tribal lands, Congress *diminished the boundaries* of the Yankton Sioux Reservation....
>
> *States* acquired primary jurisdiction over unallotted opened lands where "the applicable surplus land Act freed that land of its reservation status and *thereby diminished the reservation boundaries*."...*In contrast*, if a surplus land Act "simply offered non-Indians the opportunity to purchase land *within* established reservation boundaries," *id.*, at 470, 104 S.Ct., at 1166, then the *entire opened area* remained

---

[1] At the same time, the United States is already seeking to restrict the general cession principles recognized in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) ("*Yankton I*"), in federal criminal cases in the process of resurrecting the original boundaries of Indian reservations. *See United States v. Webb*, No. CR98-080-N-EJL (D. Idaho Jan. 12, 1999) (Memorandum Decision and Order), *argued* No. 99-30155 (9th Cir. Mar. 9, 2000) and *United States v. Scott*, No. CR98-01-N-EJL (D.Idaho June 25, 1998) (both involving the "similar" 1894 Nez Perce cession noted in *Yankton I*, 522 U.S. at 339, 353-354.

> *Indian country*. Our touchstone to determine whether a given statute *diminished or retained reservation boundaries* is congressional purpose.
>
> The 1894 Act is also readily *distinguishable* from surplus land Acts that the Court has interpreted as *maintaining reservation boundaries....In contrast,* the 1894 Act at issue here....
>
> The Yankton Tribe and the United States, appearing as *amicus* for the Tribe, rest their argument against diminishment primarily on the saving clause in Article XVIII of the 1894 Act. The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the *existing reservation boundaries were maintained.* The United States urges a similarly "holistic" construction of the agreement... Moreover, the Government's contention that the Tribe intended to cede some property but maintain the entire reservation as its territory *contradicts* the common understanding of the time: that tribal ownership was a critical component of reservation status....
>
> [W]e *conclude* that the saving clause pertains to the *continuance* of annuities, *not the 1858 borders.*
>
> [T]he record of the negotiations between the Commissioners and the Yankton Tribe contains *no discussion* of the *preservation* of the *1858 boundaries*....
>
> [T]he Commissioners' report of the negotiations signaled their understanding that the cession of the surplus lands *dissolved* tribal governance of the *1858* reservation.

Yankton I, 522 U.S. at 333, 343, 345, 345-346, 347, 353 (emphasis added).

Importantly, as this Court noted, the United States participated in *Yankton I* as *amicus curiae*.

In the *Yankton* Sioux *Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) (*"Yankton II"*) remand, the United States nevertheless pressed for the courts to recognize the 1858 reservation bounda-

ries. The court of appeals recognized this conflict, rejected the views of the United States and confirmed this aspect of this Court's decision in *Yankton I* directed to the 1858 Yankton reservation boundaries.

> The *Yankton* Court did make a number of explicit references to the status of the reservation boundaries. The Court found the 1894 Act distinguishable from those acts which it "has interpreted as maintaining reservation boundaries." *Yankton*, 118 S.Ct. at 799. The question before it was described as whether the 1894 Act "diminished the boundaries" of the reservation. *Id.* at 793. The Court distinguished situations in which states acquired primary jurisdiction over opened lands and "thereby diminished the reservation boundaries" from those in which the entire opened area remained Indian country even though non-Indians were able to purchase land. *Id.* at 797-98 (citations omitted). In the Commission reports it found evidence that the 1894 Act involved alteration of "the reservation's character" and "a reconception of the reservation." *Id.* at 802. Some of the language was "reminiscent" of that used for the diminished Unitah [sp] reservation. *Id.* ("Congress would 'pull up the nails' holding down the outside boundary" of the reservation) (citation omitted). The Court went on to hold that the savings clause of Article XVIII "pertains to the continuance of annuities, *not the 1858 borders*." *Id.* at 800 (emphasis added). These references indicate the Court's understanding that the 1858 reservation boundaries did not remain intact following passage of the 1894 Act.
>
> The Tribe is able to identify only one reservation which apparently continues to have its original boundaries even though some of the land within the boundaries has lost its reservation status—the Unitah [sp] Valley Reservation. The peculiar procedural history of the litigation involving that reservation does not suggest that it is precedent for maintenance of the original exterior borders of the Yankton Sioux Reservation....

> Based on our interpretation of what the Court said in *Yankton*, the lack of controlling precedent to suggest the original reservation boundaries can be maintained despite the extent of the diminishment, and the record before the court which we discuss below, we conclude that the original exterior boundaries of the Yankton Sioux Reservation do not serve to separate Indian country from areas under primary State jurisdiction....
>
> We recognize that the original exterior treaty boundaries of the reservation have *not* been maintained. *See Yankton*, 118 S.Ct. at 799-800....
>
> [T]he judgments are reversed in so far as the court concluded that the 1858 exterior reservation boundaries remain intact....

Yankton II, 188 F.3d at 1020-1021, 1030 (emphasis added).

The United States did not want to explain to this Court how it could ignore the holding of this Court in *Yankton I* in this manner. If the United States did not file a petition, it would not have to do so. As a result, the United States has simply agreed with the State and Local Governments that the Petition of the Yankton Sioux Tribe on this issue should be denied. According to the United States, no further explanations are necessary. The Cities, of course, support the ultimate conclusion of the United States that the Tribe's Petition should be denied. However, the path the United States chose to follow in this case is not a commendable one, to say the least.

II. THE PRIMARY ARGUMENTS SUBMITTED BY THE YANKTON SIOUX TRIBE AND THE UNITED STATES ARE INHERENTLY INCONSISTENT.

The briefs filed by the Yankton Sioux Tribe and the United States are truly remarkable. The primary argument submitted in each brief is flatly inconsistent and self-defeating. The conflict-

ing issue in this case centers around congressional intent. With reference to congressional intent, the Yankton Sioux Tribe and the United States have backed themselves into an impossible position.

Congress could have intended any *one* of three different results with reference to the boundaries of the Yankton Indian Reservation. Congress could have intended to leave the 1858 reservation boundaries intact, extinguish the 1858 reservation boundaries, or create new reservation boundaries around a smaller reservation. These are the *only* three options.

Incredibly, the position of the Yankton Sioux Tribe and the United States is premised on supporting *two* of these options at the *same* time. The Yankton Sioux Tribe and the United States have tried to have their cake and eat it too. This is an impossible position.

First, the Yankton Sioux Tribe and the United States maintain that Congress intended to leave the 1858 Yankton Reservation boundaries in place. Pet. for Writ of Cert., *Yankton Sioux Tribe v. Gaffey* at 5, No. 99-1683 (April 17, 2000); Br. for the United States in Opp'n at 8 n.5, 13, 21, 23, *South Dakota v. Yankton Sioux Tribe* and *Yankton Sioux Tribe v. Gaffey*, Nos. 99-1490 and 99-1683 (May 8, 2000). At the same time, however, the Yankton Sioux Tribe and the United States also submit that the court of appeals "correctly" recognized that Congress intended to create a diminished reservation that corresponds with the agency reserve—an action wholly unnecessary if the 1858 reservation boundaries were still in place. Br. for Yankton Sioux Tribe in Opp'n, at 10-11 *South Dakota v. Yankton Sioux Tribe,* No. 99-1490 (May 8, 2000); Br. for the United States in Opp'n, at 13, *South Dakota v. Yankton Sioux Tribe* and *Yankton Sioux Tribe v. Gaffey*, Nos. 99-1490 and 99-1683 (May 8, 2000).

Importantly, nothing in the Yankton documentation supports any of this. In this respect, the position of the Yankton Sioux Tribe and the United States is self-defeating.

Of course, neither the Yankton Sioux Tribe nor the United States structure their argument in such a way that this inconsistency appears obvious at first glance.

A. The Yankton Sioux Tribe Submits That Congress Intended To Leave The 1858 Yankton Reservation Boundaries Intact And, At The Same Time, Create An Agency Reservation Within Those Boundaries.

In its brief in opposition, the Yankton Sioux Tribe now supports the "agency reservation" as recognized by the court of appeals simply because of the "unique facts" of this case. Br. of the Tribe in Opp'n at 10. *See also* reference to "fact-based" determination that the reservation was not disestablished in the Pet. for Writ of Cert. at 6 n.3, No. 99-1683, filed by the Yankton Sioux Tribe. As a result of these "unique facts", the Yankton Sioux Tribe concludes that the court of appeals decision is correct in this respect, and that the Petition of the State and Local Government Parties should therefore be denied. *Id.* at 10-11.

Significantly, the Yankton Sioux Tribe never mentions the primary argument in its Petition in No. 99-1683 which is based on the opposite conclusion: that Congress *never* intended to alter the 1858 boundaries of the Yankton Sioux Reservation. Petition of Yankton Sioux Tribe at 5-6.

In the court of appeals, the Tribe's argument regarding *Yankton I* and the 1858 boundaries was most succintly stated:

> *Nothing* in the *South Dakota v. Yankton Sioux Tribe* opinion *touched* on the Reservation's *boundaries*....the Court left *untouched* the 1858 Treaty, which set out the *boundaries* of the Reservation. One can draw no other conclusion than that the 1858 *boundaries* remain *intact*, minus the 160,000 acres of unallotted lands.
>
> Justice O'Connor dealt with Article XVIII only in terms of restricting it to annuities. Her conclusions with respect to Article XVIII do *not* deal with *boundaries*, except to

> hold that the Article did *not* apply to the *boundaries*. Beyond shrinking the 430,000 acre Reservation by 160,000 acres, the Supreme Court left *untouched* the Treaty of 1858, which in fact did set out the *boundaries* of the Yankton Sioux Reservation, and which specifically were *not* changed by the Supreme Court in its opinion.

Appellee Yankton Sioux Tribe's Reply Br. at 24, *Yankton II*, Nos. 98-3893, 3894, 3896, 3900 (8th Cir. Mar. 11, 1999) (emphasis added).[2]

The court of appeals correctly rejected the 1858 boundaries argument of the Yankton Sioux Tribe, as noted *supra* at 5-6. The *Bruguier* opinion of the South Dakota Supreme Court confirms that conclusion. There is no conflict on this issue between

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[2] The Yankton Sioux Tribe also does not mention the fact that the question of an agency reservation was not briefed or argued in either the district court or the court of appeals. Moreover, immediately after the decision of the court of appeals, *the Yankton Sioux Tribe squarely rejected the concept of an agency reservation*. As the Yankton Sioux Tribe noted in its application for a stay in the court of appeals:

> The parties to this appeal argued in their petitions for rehearing that prior Supreme court cases allowed for *two* possible resolutions to the captioned appeal [1858 reservation boundaries in tact or extinguished]. The circuit decision creates a third option, which appears to be *inconsistent with all prior Supreme court cases*. Whether the Supreme Court will approve this third option is *clearly substantial issue*.

Mot. for Stay Pending Pet. for Writ of Cert., *Yankton II*, 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900) (emphasis added).

On this point, the Yankton Sioux Tribe was clearly correct the first time. The Yankton documentation does not support an agency reservation and no one argued that it did. In addition, the decision of the Supreme Court of the State of South Dakota in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999) confirms the scope of this separate conflict within the letter and spirit of Supreme Court Rule 10(5).

the court of appeals and the state supreme court. The Petition of the Yankton Sioux Tribe in No. 99-1683 should be denied.

B. The United States Also Submits That Congress Intended To Leave The 1858 Yankton Reservation Boundaries Intact And, At The Same Time, Create An Agency Reservation Within Those Boundaries.

Incredibly, the United States makes the same conflicting argument regarding congressional intent. The United States continues to maintain that the court of appeals "erred" in not recognizing the 1858 reservation boundaries. Br. for the United States in Opp'n, at 8, n.5 13, 21, 23, *State of South Dakota v. Yankton Sioux Tribe* and *Yankton Sioux Tribe v. Gaffey*, Nos. 99-1490 and 99-1683 (May 8, 2000). At the same time, the United States, like the Yankton Sioux Tribe, maintains that the court of appeals "correctly concluded" that the Congress intended to create a new agency reservation. Id. at 13.

The United States finesses this flatly inconsistent position by placing the agency reservation issue in the context of the absence of a clear indication of congressional intent to disestablish the Yankton Reservation. Br. for the United States in Opp'n, at 9-13, *State of South Dakota v. Yankton Sioux Tribe* and *Yankton Sioux Tribe v. Gaffey*, Nos. 99-1490 and 99-1683 (May, 8, 2000). Nevertheless, the argument of the United States remains as fundamentally flawed as that of the Yankton Sioux Tribe. Congress could not have intended to maintain the 1858 reservation boundaries and, at the same time, create new boundaries for a new agency reservation. Again, nothing in the Yankton documentation is even asserted to support this conflicting position.

In the alternative, the United States now also suggests that the agency lands could have subsequently gained reservation status. Br. for the United States in Opposition at 20, *Yankton Sioux Tribe v. South Dakota*, Nos. 99-1490 and 99-1683 (May 8,

2000). Even here, however, the United States does not explain why Congress would have adopted this course of action if the 1858 reservation boundaries were still intact.

With reference to the 1858 boundaries, contrary to the argument of the United States, the court of appeals correctly confirmed that the boundaries were extinguished by the 1894 Act. *See Yankton II*, 188 F.3d at 1020-1021, 1030, *supra* at 5-6. Compounding the conflict and the confusion in this instance is the additional fact that *the United States initially conceded that this Court held that the 1858 reservation boundaries were extinguished in Yankton I.*

> [T]he United States Supreme Court found the savings clause *insufficient* to maintain the reservation boundaries of the 1858 Treaty here, and thus did not prevent diminishment of the Reservation...

Summ. J. Br. for the United States at 22 n. 5, *Yankton II*, 14 F.Supp.2d 1135 (D.S.D. 1998) (No. 98-4042) (emphasis added). *See also* Summ. J. Br. for the United States at 2,5,6.

Predictably, the United States mentions none of this in the Brief in Opposition. As the Cities correctly noted in their *amici* brief in 99-1490, the arguments of the United States steer clear of even mentioning reservation boundaries. Br. of Cities in Supp. of Pet'rs at 18, *South Dakota v. Yankton Sioux Tribe*, No. 99-1490, (Mar. 7, 2000).

Moreover, in the process the United States has once again failed to honor the position advanced by the Office of the Solicitor General in this Court in *Yankton*, (i.e., that disestablishment was inevitable if the argument of the United States regarding Article XVIII was rejected and the 1858 Yankton boundaries were not recognized by this Court, because *nothing* in the Yankton documentation supported any other conclusion.) Br. for United States, Cities App. 202a-232a; Tr. of Oral Argument at 270a-271a, *Yankton I*, 522 U.S. 329 (1998) (No. 96-1581), Cities App. 266a.

As noted supra at 5-6, the court of appeals recognized that *Yankton I* resolved the issue of the 1858 reservation boundaries and squarely rejected the new argument of the United States. The *Bruguier* opinion of the South Dakota Supreme Court unequivacally supports the court of appeals on this point. There is no conflict for this Court to resolve on this issue.[3]

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[3] In the final analysis, the conflict and confusion in both the Brief in Opposition of the Yankton Sioux Tribe and the Brief in Opposition of the United States lend further support to the Petition filed by the State and Local Government Parties. The congressional intent conflict further highlights the fact that nothing in the Yankton documents supports an agency reservation as recognized by the court of appeals. And, the United States has already conceded (as the State and Local Brief in Opposition points out) that the court of appeals "did not articulate its rationale for that determination." Br. for the United States in Opp'n, at 20, *State of South Dakota v. Yankton Sioux Tribe* and *Yankton Sioux Tribe v. Gaffey*, Nos. 99-1490 and 99-1683 (May 8, 2000).

In this light, the holding of court of appeals cannot be said to be fact bound or otherwise so limited as not to qualify for this Court's review at this time. The Yankton Sioux Tribe was correct when it acknowledged that the court of appeals holding is "inconsistent with all prior Supreme Court cases" and concluded that this holding would present this Court with a substantial issue for consideration. Mot. for Stay Pending Pet. for Writ of Cert., *Yankton II*, 188 F.3d. 1010 (8th Cir. 1999) (No. 98-3893, 3894, 3896, 3900). Moreover, the "disestablished" and "terminated" holding of the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999) reinforces and solidifies the substantial nature of the inconsistencies and conflict between the court of appeals and the Supreme Court of the State of South Dakota on this issue. In some fashion, this Court should resolve that conflict. *See* the suggestion of the State of South Dakota, Charles Mix County, Southern Missouri Waste Management District, and the Cities regarding Summary Disposition. Pet. for Writ of Cert., at 3 n.2, *South Dakota v. Yankton Sioux Tribe*, No. 99-1490 (Mar. 7, 2000); Br. of Cities in Supp. of Pet'rs at 3 n.1, No. 99-1490 (Mar. 7, 2000).

CONCLUSION

For the foregoing reasons, and those stated in the Briefs in Opposition of the United States and the State and Local Government Parties, the Petition of the Yankton Sioux Tribe should be denied.

Respectfully submitted this 24th day of May, 2000.

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